

Mailing Date: September 28, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 10-1688
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
FRATERNAL ORDER OF EAGLES	:	License No. CC-4450
LITTLESTOWN AERIE NO. 2226	:	
427 Mengus Mill Road	:	LID 2046
Littlestown, PA 17340-9126	:	
	:	

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OPINION

Fraternal Order of Eagles Littlestown Aerie No. 2226 (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), mailed June 16, 2011, wherein the ALJ sustained all five (5) counts of Citation No. 10-1688 (“the Citation”) issued by the Pennsylvania State Police,

Bureau of Liquor Control Enforcement (“Bureau”), and imposed a fine of two thousand six hundred dollars (\$2,600.00) and a suspension of one hundred twenty (120) days.

The first count of the Citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and section 315(b) of the Local Option Small Games of Chance Act (“LOSGCA”) [10 P.S. § 315(b)] in that during the periods between December 3 through 9, December 10 through 16, December 17 through 23, December 24 through 31, 2009, January 1 through 7, January 8 through 14, January 15 through 21, January 22 through 28, January 29 through February 4, February 5 through 11, February 12 through 18, February 19 through 25, February 26 through March 4, March 5 through 11, March 12 through 18, March 19 through 25, March 26 through April 1, April 2 through 8, April 9 through 15, April 16 through 22, April 23 through 29, April 30 through May 6, May 7 through 13, and May 14 through 20, 2010, Licensee, by its servants, agents or employees, offered and/or awarded more than five thousand dollars (\$5,000.00) in cash or merchandise in a seven (7)-day period.

The second count of the Citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471], section 314 of the LOSGCA [10 P.S. § 314], and section 901 of the Department of Revenue Regulations [61 Pa. Code §

901] in that during the period June 1, 2009, through April 30, 2010, Licensee, by its servants, agents or employees, used funds derived from the operation of games of chance for purposes other than those authorized by law.

The third count of the Citation charged Licensee with violating sections 401(b) and 406(a)(1) of the Liquor Code [47 P.S. §§ 4-401(b), 4-406(a)(1)] in that on February 20, March 6, and March 17, 2010, Licensee, by its servants, agents or employees, sold alcoholic beverages to nonmembers.

The fourth count of the Citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471], and section 315(a) of the LOSGCA [10 P.S. § 315(a)] in that on March 17, April 17, and May 5, 2010, Licensee, by its servants, agents or employees, offered and/or awarded an individual prize exceeding the maximum cash value of five hundred dollars (\$500.00).

The fifth count of the Citation charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and sections 5512 and/or 5513 of the Crimes Code [18 Pa. C.S. §§ 5512, 5513] in that on March 17, April 17, and May 5, 2010, Licensee, by its servants, agents or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on its licensed premises.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Pennsylvania Liquor Control Board (“Board) shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his or her discretion, or if his or her decision was not based upon substantial evidence. [47 P.S. § 4-471(b)]. The Commonwealth Court has defined “substantial evidence” to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers’ Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984). Furthermore, the ALJ has the exclusive right to resolve conflicts in the evidence and to make credibility determinations. McCauley v. Pennsylvania Board of Probation and Parole, 98 Pa. Cmwlth. 28, 510 A.2d 877 (1986).

On appeal, Licensee essentially restates the standard of review in alleging that the ALJ’s Findings of Fact are not supported by substantial evidence and that the ALJ committed an error of law in sustaining the Citation. Because Licensee did not provide any further explanation for the basis of its appeal, the Board has conducted a general administrative review of the certified record, including the ALJ’s Adjudication and Order, Licensee’s Appeal,

and the Notes of Testimony and Exhibits from the hearing held on May 9, 2011. Based upon its review, the Board has concluded that ALJ did not commit an error of law or abuse his discretion in sustaining counts one, two, four, and five of the Citation, and further that those counts were supported by substantial evidence; however, the ALJ's decision to sustain count three of the Citation was in error.

Relative to counts one, two, four, and five of the Citation, the courts have consistently held that violations of criminal laws other than the Liquor Code may constitute sufficient cause for the imposition of penalties, pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], when reasonably related to the sale and use of alcoholic beverages, including gambling. See Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Harrisburg Knights of Columbus Home Ass'n, 989 A.2d 39 (Pa. Cmwlth. 2009); Pennsylvania Liquor Control Bd. v. TLK, Inc., 518 Pa. 500, 544 A.2d 931 (1988). In such cases, the Pennsylvania Supreme Court has held that the Bureau must prove an element of scienter, in that the licensee knew or should have known of illegal activities by an employee or patron, for the licensee to be liable. TLK, Inc., 518 Pa. at 504, 544 A.2d at 933. However, the licensee may defend its license by

demonstrating substantial affirmative steps to guard against a pattern of known illegal activities. *Id.* at 504-505.

The LOSGCA provides that no more than five thousand dollars (\$5,000.00) in cash or merchandise may be awarded for small games of chance in any seven (7)-day period. [10 P.S. § 315(b)]. The maximum cash value allowed for any single chance is five hundred dollars (\$500.00) unless a special permit is obtained. [10 P.S. § 315(a), (d)]. The LOSGCA also mandates that all proceeds from games of chance be used exclusively for public interest purposes or for the purchase of games of chance as permitted by law. [10 P.S. § 314]. Additionally, section 901.731 of the Department of Revenue's LOSGCA Regulations provides in pertinent part that a licensed eligible organization may not permit the display or operation of a punchboard or pull-tab that has been tampered with in a manner which may deceive the public or which affects the chances of winning or losing. [61 Pa. Code § 901.731(b)(1)].¹

¹ The fifth count of the Citation alleges violations of sections 5512 "and/or" 5513 of the Crimes Code [18 Pa. C.S. §§ 5512, 5513] as "other sufficient cause" for citing Licensee under section 471 of the Liquor Code. [47 P.S. § 4-471]. The cited statutes provide a broad prohibition on all forms of unlawful gambling. The Commonwealth Court has held that where a citation informs the licensee of the "type and date of the alleged violation," it satisfies the due process notice requirement. Pennsylvania Liquor Control Bd. v. Reda, 463 A.2d 108, 109 (Pa. Cmwlth. 1983). But generally it is not sufficient to merely give notice of a general charge when a more specific charge is applicable. See Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Detrich-Brechbill Home Assn., Inc., Citation No. 08-0058 (July 6, 2011). However, because this issue was not raised on appeal, it will not be considered in this case.

The record in this case reveals that a Bureau enforcement officer, Susan Clever, conducted an inspection of the licensed premises on May 31, 2010, during which she requested Licensee's business records. [N.T. 33]. Licensee provided records² showing weekly "total prizes" for small games of chance in play between December 9, 2009, and May 20, 2010, ranging from thirty-seven thousand seven hundred ten dollars (\$37,710.00) to ninety-eight thousand three hundred thirty-four dollars (\$98,334.00). [Ex. C-5; N.T. 37].

During an inspection by Officer Clever on May 5, 2010, Licensee provided a receipt for a lawn mower that was being offered as the prize in a raffle at the licensed premises. [N.T. 19-20, 32]. The receipt shows a sale price of one thousand nine hundred ninety-nine dollars (\$1,999.00) and a delivery fee of fifty-nine dollars (\$59.00). [Ex. C-4]. Ms. Clever stated that she confirmed with the Adams County Treasurer's Office on May 18, 2010, that Licensee did not have a special permit allowing it to offer a raffle prize with a cash value exceeding the statutory maximum. [N.T. 32-33].

Also during the inspection on May 5, 2010, Officer Clever was informed by an officer of Licensee that it places its small games of chance revenue into

² The ALJ in his third finding of fact refers to May 5, 2010, as the date of an inspection by the Bureau enforcement officer. Although evidence was presented that the officer conducted an inspection of the premises on that date, the record reflects that Licensee provided the records shown in Exhibit C-5 during the officer's inspection on May 31, 2010.

four (4) bank accounts, which include other funds. [N.T. 63]. Officer Clever testified that Licensee's officer told her that the funds, including the small games of chance profits, are used for operational expenses. [N.T. 71].

During the same inspection, Officer Clever observed a pull-tab game being offered by Licensee at a price of three (3) chances for one dollar (\$1.00) with a steal prize of fifty dollars (\$50.00). [N.T. 29-30]. Ms. Clever stated that the game as manufactured was designed to cost ten cents (\$0.10) per play with a steal prize of ten dollars (\$10.00) and that Licensee's officer admitted to altering the game. [N.T. 29, 31].

Licensee's secretary, Harry David Herring, testified at the hearing but did not rebut the Bureau's evidence relating to counts one, two, four, or five. Mr. Herring admitted that the offering of the tractor as a prize without a special permit was an oversight. [N.T. 85]. Therefore, the ALJ did not err in sustaining counts one, two, four, and five of the Citation, as the Board finds substantial evidence to support the violations at issue.

Relative to count three, club licensees and their officers, servants, agents and employees are generally prohibited from selling liquor or malt or brewed beverages to any person except a member of the club. [47 P.S. § 4-406(a)(1)]. A club may serve alcoholic beverages to nonmembers only if it has a catering

license and certain conditions are fulfilled, in accordance with section 5.83 of the Board's Regulations [40 Pa. Code § 5.83]. Pennsylvania Liquor Control Bd. v. American Legion Home Assn. of Cresson, 81 Pa. Cmwlth. 503, 504-505, 474 A.2d 68, 69 (1984).

The burden is on the Bureau to prove its case before the ALJ by a clear preponderance of the evidence. In re Omicron Enterprises, 68 Pa. Cmwlth. 568, 571, 449 A.2d 857, 859 (1982). In the case of a club licensee charged with serving a nonmember, the Bureau thus has the burden to demonstrate, *inter alia*, that the person served on the date or dates charged was not, in fact, a member of the club.

Here, the record reveals that Ms. Clever entered the licensed premises in an undercover capacity on the dates charged in the Citation and was served alcoholic beverages without question as to membership. [N.T. 13-18]. However, absent from the record is any evidence that Ms. Clever was not a member of Licensee at the time she was served alcoholic beverages. Although Ms. Clever very well may have not been a member of Licensee on the dates she was served, it is the Bureau's burden to produce evidence establishing a violation. The mere fact that Ms. Clever was served without being asked whether she was a member does not establish that a sale to a nonmember

took place.³ Since the Bureau failed to produce evidence on an essential element of the alleged violation, the decision of the ALJ to sustain count three was not supported by substantial evidence.

For the foregoing reasons, the Adjudication and Order of the ALJ is reversed as to count three of the Citation and affirmed as to the all other counts.

³ Although the ALJ refers to the transactions as “nonmember buys” [N.T. 35] and “nonmember service” [Adjudication and Order, Finding of Fact No. 5], as discussed, the Board finds no evidence for these conclusory statements.

ORDER

The appeal of Licensee is granted in part and denied in part.

The decision of the ALJ is reversed as to count three, and the fine imposed with regard to that count is vacated.

The decision of the ALJ is affirmed as to counts one, two, four, and five.

The fine of two thousand two hundred dollars (\$2,200.00) and the one hundred twenty (120)-day suspension remain in effect.

The original fine imposed by the ALJ of two thousand six hundred dollars (\$2,600.00) has been paid. Licensee is thus entitled to a refund of four hundred dollars (\$400.00).

The case is hereby remanded to the ALJ to ensure compliance with this Opinion.

Board Secretary